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Affirmative Action and Diversity in Public Education — Legal Developments

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Summary

Nearly a quarter century after the Supreme Court ruling in *Regents of the University of California v. Bakke*, the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body." In recent years, however, federal courts began to question the Powell rationale, unsettling expectations about the constitutionality of diversity-based affirmative action in educational admissions and faculty hiring.

In striking down the admissions process at the University of Texas School of Law, the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution. Siding with *Hopwood* was the Eleventh Circuit, in *Johnson v. Board of Regents*, which voided a numerical "racial bonus" awarded to minority applicants for freshman admission at the University of Georgia. A circuit court conflict was created, however, when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. The judicial divide over *Bakke*'s legacy widened with the opposing decisions of two federal districts courts in the University of Michigan cases. *Gratz v. Bollinger* upheld for diversity reasons the race-based undergraduate admissions program, while the trial judge in *Grutter v. Bollinger* voided the Michigan Law School's student diversity policy. The Sixth Circuit reversed in *Grutter*, but before it could act in *Gratz*, the Supreme Court agreed to review both the Michigan undergraduate and law school admissions policies.

On April 1, 2003, the U.S. Supreme Court heard oral arguments in the University of Michigan cases. Constitutionally speaking, the central issue posed is whether Michigan's admissions policies pass "strict" judicial scrutiny, as demanded by the Supreme Court when evaluating any race-based governmental action under the Equal Protection Clause. Absent a history of past discrimination, they ask first, whether the university has a "compelling" interest in any educational benefits that may flow from a racially diverse student body. And second, are the means adopted by the university "narrowly tailored" – or no more than necessary – to achieve that objective. The fate of racial diversity policies in higher education, and as discussed in this report, at the elementary and secondary level as well, may depend on the Court's answers to these questions. And because any constitutional holding in the Michigan cases may be translate to the private sector under the federal civil rights laws, nonpublic schools, colleges, and universities would probably feel its effects, as may public and private employers in the quest for a racially and ethnically diverse workforce.

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Nearly a quarter century after the Supreme Court ruling in *Regents of the University of California v. Bakke*,[1] the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body."

In the last decade, however, federal courts began to question the Powell rationale, unsettling expectations about the constitutionality of diversity-based affirmative action in educational admissions and faculty hiring decisions. In striking down the admissions process at the University of Texas School of Law, the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution.[2] Reverberations of the 1996 *Hopwood* opinion are apparent in several subsequent cases, which voided "race conscious" policies maintained by institutions of higher education as well as public elementary and secondary schools. Some judges avoided resolving the precedential effect of Justice Powell's opinion by deciding the case on "narrow tailoring"or other grounds not dependent on the constitutional status of student diversity as a compelling state interest.[3] But, in *Johnson v. Board of Regents*, the Eleventh Circuit sided with

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[1]438 U.S. 265 (1978).

[2]78 F.3d 932, 944 (5th Cir.)("Justice Powell's view in Bakke is not binding precedent on the issue."), cert. denied, 518 U.S. 1033 (1996). See also Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C.Cir. 1998)(stating, without addressing Bakke, that diversity cannot "be elevated to the 'compelling' level").

[3]See Brewer v. West Irondequoit Center School District, 212 F.3d 738, 747-49 (2d Cir. 2000)(noting that "there is much disagreement among the circuit courts as to . . .the state of the law under current Supreme Court jurisprudence," but concluding that, regardless of Bakke, reducing racial isolation may be a compelling interest under Second Circuit precedent); Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130 (4th Cir. 1999)(explaining that the status of educational diversity as a compelling interest is "unresolved," and rather than rule on the issue, decided the case solely on narrow tailoring grounds); Wessmann v. Gittens, 160 F.3d 790, 795, 800 (lst Cir. 1998)(While "[t]he question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled," the court concluded defendant's apparent interest

(continued...)

Hopwood by rejecting diversity as constitutional justification for a numerical "racial bonus" awarded minority freshman applicants to the University of Georgia. A circuit court conflict was created when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. *Smith v. University of Washington* was the first federal appeals court to rely on Justice Powell's decision as binding precedent on the issue.[4] The judicial divide over *Bakke*'s legacy was vividly underscored by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of the University of Michigan,[5] the other voiding a special minority law school admissions program at the same institution.[6] The latest word on the topic was delivered by the Sixth Circuit *en banc* court in *Grutter v. Bollinger*,[7] when it ruled that the Law School's interest in achieving the educational benefits of a diverse student body is compelling, and that its admissions policy is "narrowly tailored " to that goal. An appellate decision in undergraduate admissions case, *Gratz v. Bollinger*,[8] was preempted by the Supreme Court which, on December 2, 2002, agreed to review both the Michigan undergraduate and law school admissions policies.

The first part of this report briefly reviews the judicial evolution of race-based affirmative action, particularly in relation to public education. Recent rulings challenging the use of racial admissions and hiring practices by public educational institutions are then considered for their implications on future developments in the law of affirmative action.

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[3](...continued)
in "racial balancing" of the student body was neither "a legitimate [n]or necessary means of advancing" diversity); Buchwald v. University of New Mexico School of Medicine, 159 F.3d 487, 499 (10th Cir. 1998)(noting the absence of "a clear majority opinion" in Bakke, but according qualified immunity to defendants who relied upon that case in adopting a preference based on durational residency); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998)(citing Bakke for statement that "whether there may be compelling interests other than remedying past discrimination remains 'unsettled,'" but finding defendant's remedial justification valid).

[4]Smith v. University of Washington Law School, 233 F.3d 1188, 1201 (9th Cir. 2000)(pursuant to Bakke, "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race conscious measures"), cert. denied, 121 S.Ct. 2192 (2001).

[5]Gratz v. Bollinger, 122 F.Supp.2d 811 (E.D.Mich. 2000).

[6]Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001)(concluding that "Bakke does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest").

[7]288 F.3d 732 (6th Cir. 2002).

[8]Supra n. 5.

Introduction

The origins of affirmative action law may be traced to the early 1960's as first, the Warren, and then the Burger Court, grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[9] These holdings ushered in a two decade era of "massive" desegregation--first in the South, and later the urban North--marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees have since sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations, it appears that the district has complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable."[10]

A statutory framework for affirmative action in employment and education was enacted by the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act. The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate,"[11] to make discrimination victims whole. Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. But the Equal Employment Opportunity Commission has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take action to correct the effects of past discrimination.[12]

The term "affirmative action" resurfaced in federal regulations construing the 1964 Act's Title VI, which prohibits racial or ethnic discrimination in all federally

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[9]See e.g. Green v. County Board, 391 U.S. 430 (1968); Swann v. Board of Education, 402 U.S. 1 (1971); Keyes v. Denver School District, 413 U.S. 189 (1973).

[10]Dowell v. Board of Education, 498 U.S. 237 (1991). See also Freeman v. Pitts, 503 U.S. 467 (1993)(allowing incremental dissolution of judicial control) and Missouri v. Jenkins, 515 U.S. 70 (1995)(directing district court on remand to "bear in mind that its end purpose is not only `to remedy the violation' to the extent practicable, but also `to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'").

[11]42 U.S.C. 2000e-5(g).

[12]29 C.F.R. Part 1608 (the guidelines state the EEOC's position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination.)

assisted "programs" and activities,[13] including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage "voluntary affirmative action to attain a diverse student body."[14] Another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid if the aid is necessary to overcome effects of past institutional discrimination.[15] Affirmative action in higher education was before the Congress in 1998, when the full House defeated (by a 249 to 171 vote) a bill to prohibit federal aid to colleges and universities that consider race, ethnicity, or sex in the admission process.

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. A "notable lack of unanimity" was evident from the six separate opinions filed in that case. One four-Justice plurality in Bakke voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school which set-aside sixteen of one hundred positions in each incoming class for minority students, where the institution itself was not shown to have discriminated in the past. Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds while endorsing the nonexclusive consideration of race as an admissions criteria to foster student diversity.

In Justice Powell's view, neither the state's asserted interest in remedying "societal discrimination," nor of providing "role models" for minority students was sufficiently "compelling" to warrant the use of a "suspect" racial classification in the admission process. But the attainment of a "diverse student body" was, for Justice Powell, "clearly a permissible goal for an institution of higher education" since diversity of minority viewpoints furthered "academic freedom," a "special concern of the First Amendment."[16] Accordingly, race could be considered by a university as a "plus" or "one element of a range of factors"– even if it "tipped the scale" among qualified applicants – as long as it "did not insulate the individual from comparison with all the other candidates for the available seats."[17] The "quota" in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting Bakke but reversed the judicial ban on consideration of race in admissions.

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[13]42 U.S.C. 2000d et seq.

[14]44 Fed. Reg. 58,509 (Oct. 10, 1979).

[15]59 Fed. Reg. 8756 (Feb. 23, 1994). See also Letter from Judith A. Winston, General Counsel, United States Department of Education, to College and University Counsel, July 30, 1996 (reaffirming that it is permissible in appropriate circumstances for colleges and universities to consider race in admissions decisions and granting financial aid).

[16]Id. at 311-12.

[17]Id. at 317.

Bakke was followed by *Wygant v. Jackson Board of Education*,[18] where a divided Court ruled unconstitutional the provision of a collective bargaining agreement that protected minority public school teachers from layoff at the expense of more senior white faculty members. While holding the specific layoff preference for minority teachers unconstitutional, seven *Wygant* Justices seemed to agree in principle that a governmental employer is not prohibited by the Equal Protection Clause from all race-conscious affirmative action to remedy its own past discrimination. Another series of decisions approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects,[19] and in the design of certain broadcast licensing schemes,[20] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs.[21] However, in each of these cases, the Justices failed to achieve a consensus on most issues, with bare majorities, pluralities, or--as in *Bakke*--a single Justice, determining the "law" of the case.

By the mid-1980's, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII of the 1964 Civil Rights Act.[22] These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[23] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[24] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by a "manifest imbalance"--or "historic," "persistent," and "egregious" underrepresentation--of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Second, but of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass legal or constitutional muster if they displaced more senior white workers. But the consideration of race or gender as a "plus" factor in employment decisions, when it did not unduly hinder or "trammel" the "legitimate expectations" of non-minority employees, won ready judicial acceptance.[25] Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and "narrowly tailored" to avoid becoming rigid "quotas."

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[18]476 U.S. 267 (1986).

[19]Fullilove v. Klutznick, 448 U.S. 448 (1980).

[20]Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[21]City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[22]42 U.S.C. §§ 2000e et seq.

[23]United Steelworkers v. Weber, 443 U.S. 193 (1979).

[24]Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

[25]United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

Not until 1989, however, did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other "benign" legislative purpose. Disputes prior to *City of Richmond v. J.A. Croson*[26] yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same "strict scrutiny" as applied to "invidious" racial discrimination under the Equal Protection Clause, an "intermediate" standard resembling the test for gender-based classifications, or simple rationality. In *Croson*, a 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not "narrowly tailored" to a "compelling" governmental interest. While "race-conscious" remedies could be legislated in response to proven past discrimination by the affected governmental entities, "racial balancing" untailored to "specific" and "identified" evidence of minority exclusion was impermissible. *Croson* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,[27] the Court upheld certain minority broadcast licensing schemes approved by Congress to promote the "important" governmental interest in "broadcast diversity."

The two-tiered approach to equal protection analysis of governmental affirmative action was short-lived. In *Adarand Constructors, Inc. v. Pena*,[28] the Court applied "strict scrutiny" to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by "socially and economically disadvantaged individuals," defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all "racial classifications" by government at any level must be justified by a "compelling governmental interest" and "narrowly tailored" to that end. But the majority opinion, by Justice O'Connor, sought to "dispel the notion" that "strict scrutiny is `strict in theory, but fatal in fact,'" by acknowledging a role for Congress as architect of remedies for discrimination nationwide. "The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." No further guidance is provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort and, as discussed *infra*, must be adequately justified and narrowly drawn to pass constitutional muster.

The Court applied the *Adarand* rule in *Miller v. Johnson.*[29] In *Miller*, the Court reviewed a congressional redistricting plan for the State of Georgia. The plan, adopted at the insistence of the Justice Department, was designed to create three

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[26]488 U.S. 469 (1989).

[27]497 U.S. 547 (1990).

[28]515 U.S. 200 (1995).

[29]515 U.S. 900 (1995).

congressional districts that had a majority of African-American residents. The Court reversed its traditional deference to remedial race-conscious apportionment[30] and held that while race could be considered in redistricting, the Justice Department's policy of making race the predominant factor failed the strict scrutiny test. The *Miller* holding was revisited in *Bush v. Vera*[31] and *Shaw v. Hunt*,[32] both of which affirmed *Miller's* essential holding by sustaining challenges to race-based redistricting plans.

Recent Legal Developments

Student Diversity in Higher Educational Admissions. The emphasis of *Adarand* on past discrimination has prompted an upsurge in judicial challenges to educational diversity as an independent justification for student and faculty affirmative action. The notion that diversity could rise to the level of a compelling interest in the educational setting sprang two decades ago from Justice Powell's opinion in the *Bakke* case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the "robust" exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."[33] Thus, a public educational institution could properly deem an applicant's race to be a "plus" factor, provided that the applicant was not insulated from comparison with all other applicants, based upon a consideration of combined qualifications, including personal talents, leadership qualities, maturity, and the like. In other words, the race of a candidate could not be the "sole" or "determinative" factor.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the "dual admission program" at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

More recently, the U.S. Supreme Court denied review of the Fifth Circuit decision in *Hopwood v. State of Texas (Hopwood II)*,[34] which invalidated a special minority admissions program of the University of Texas Law School. The procedure

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[30]See, e.g. United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 161 (1977); Shaw v. Reno, 509 U.S. 630, 658-75 (1993)(White J., dissenting).

[31]517 U.S. 952 (1996).

[32]517 U.S. 899 (1996).

[33]Bakke, 438 U.S. at 315.

[34]95 F.3d 53 (5th Cir.), cert. denied No 95-1773, 116 S. Ct 2581 (1996).

adopted by the state provided for two separate paths of applicant assessment, with race determining the path taken. One was for blacks and Mexican-Americans, the other for whites and all other "non-preferred" minorities. Disparate admissions standards applied to the two groups so that the cutoff scores for black and Mexican-Americans were lower, overall, than those used to assess other candidates. At no time were the applications of the preferred group compared to, or combined with, those in the other group. In short, "race was always an overt part of the review of an applicant's file." Suit was filed by four white applicants who had been rejected for admission to the law school class of 1992.

A three judge appellate panel held that the desire to admit a diverse student body never provides a "compelling" justification for the consideration of race in student admissions, and that despite its early history of racial exclusion, the law school had failed to demonstrate sufficient continuing effects of its own prior illegal acts to warrant remedial affirmative action. The *Hopwood II* court rejected the diversity rationale proposed by Justice Powell in *Bakke* as "not binding precedent," since his opinion was not formally joined by any other Justice. Race and ethnicity can never be used for nonremedial purposes as a "proxy for other characteristics" valued by an educational institution since that would inevitably lead to racial "stereotyp[ing]" and "stigmatization" forbidden by *Croson* and *Adarand*. Instead,

> For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny

Hopwood II sharply narrowed the scope of what constitutes past discrimination sufficient to justify a preferential admissions policy. Past societal discrimination was deemed an inadequate basis for considering race in the admissions process, since such an expansive definition would admit of "no viable limiting principle," and the spectrum of acceptable proof for past discrimination's present effects was likewise limited. Thus, the showing by the University of Texas Law School that discrimination had occurred within the Texas state school system as a whole, including the University of Texas undergraduate programs, was insufficient to justify the law school's use of race in its admissions process. The Fifth Circuit decision implies that the only discrimination that would amount to a compelling state interest for race-based remediation would have to be specific discrimination within the law school itself. *Hopwood II* joined an earlier Fourth Circuit ruling, *Podberesky v. Kirwan*,[35] which invalidated a race-based scholarship program administered by the University of Maryland for the exclusive benefit of black students.

Subsequently, another Fifth Circuit panel reviewed an appeal from an injunction order entered by a federal district court on remand from the 1996 *Hopwood II*

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[35]38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct 2001 (1995).

decision. In *Hopwood v. State of Texas (Hopwood III)*,[36] the appeals court reviewed the district court's determination of three issues remanded by *Hopwood II*. First, an award of attorneys' fees to plaintiffs' counsel was upheld, as was the trial judge's denial of monetary damages and specific relief to the rejected white applicants who were found to have had "no reasonable chance" of admission to the law school in 1992, even under a "race-blind" system. More to the point, however, the appeals court applied the "law of the case doctrine" to leave standing those aspects of *Hopwood II* that rejected both a remedial and diversity rationale for the Texas law school's race-based admissions program. Only when a previous ruling is "clearly erroneous," or "dead wrong," said the court, is it judicially proper to disturb the ruling of another appellate panel involving the same legal controversy. Consequently, while there was no direct precedent in *Bakke* or elsewhere for *Hopwood II*'s cramped definition of past discrimination – limited to the law school itself – as a precondition for the race-based admissions program, it was "not clear error for a court of appeals to tackle legal questions that the Supreme Court has declined to answer." Similarly, the departure from Justice Powell's diversity rationale was permissible since not endorsed by any of the other Justice, and "the *Hopwood II* panel was free to determine which among the competing rationales offered by the Justices in *Bakke* is constitutionally valid."

> Although Justice Powell would surely have disagreed with that holding, we cannot say that Hopwood II conflicts with any portion of Bakke that is binding on this court. Some may think it was imprudent for the Hopwood II panel to venture into uncharted waters by declaring the diversity rationale invalid, but the panel's holding clearly does not conflict with controlling Supreme Court precedent.

Thus, in its latest ruling, the Fifth Circuit read *Bakke* as neither requiring, nor foreclosing, the acceptance by lower courts of diversity as a compelling state interest.

The district court, on remand from *Hopwood II*, had entered an injunction forbidding any consideration of racial preferences in admission to the law school. The court of appeals reversed this aspect of the decree for two reasons. First, it had not been preceded by formal hearings into the necessity for such relief, nor was the judgment supported by finding of fact and conclusions of law as required by federal procedural rules. Second, on its face, the injunction was found to conflict with the "square holding" of *Bakke*. That is, the injunction

> forbids the University from using racial preferences for any reason, despite Bakke's holding that racial preferences are constitutionally permissible in some circumstances. Consistent with that position, Hopwood II does not bar the University from using race for any and all remedial purposes; rather Hopwood II bars the University from using race to remedy the effects of previous discrimination in other components of Texas's public education system only. By enjoining any and all use of racial preferences, the district court went beyond the holding of Hopwood II and, in the process, entered a judgment that conflicts with Bakke.

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[36] 236 F.3d 256 (5th Cir. 2000).

The effect of *Hopwood III* was to lift the district court injunction, at least until justified by further proceedings below, while leaving in tact the constitutional rationale and conclusion of the appeals court in *Hopwood II.*

The *Hopwood* trilogy was later joined by a three-judge panel decision of the Eleventh Circuit in *Johnson v. Board of Regents*,[37] which voided a numerical "racial bonus" awarded minority applicants for freshman admission to the University of Georgia (UGA). A three-tiered admissions program at that institution first evaluates all applicants based strictly on academic credentials, i.e SAT scores and grades. Those who are neither accepted nor rejected on the basis of predetermined cut-off scores at this stage are evaluated further, based on a "Total Student Index" (TSI), taking into account a combination of twelve weighted factors – academic, extracurricular, and demographic. Minority applicants who are self-identified as such are awarded a 0.5 point credit out of a maximum possible 8.15 total points for all 12 factors. Pre-set TSI threshold and minimum scores again determine acceptance and rejection at this stage. Thereafter, all applicants remaining in the pool move forward to the final phase where each applicant's file is individually examined and evaluated by admissions officers. The district court found that explicit consideration of race in the admissions policy was unlawful because student body diversity is not a compelling state interest able to withstand strict judicial scrutiny. The appeals panel affirmed for the different reason that even if diversity were "assumed" a valid constitutional objective, "[a] policy that mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process" was not "narrowly tailored" to that end.

While declining to decide the diversity issue, the appellate opinion left little doubt as to the circuit judges' view of the matter. Regarding Justice Powell's discussion in *Bakke*, and his endorsement of the "Harvard Plan" to achieve broad-based diversity in student admissions, the court noted the lack of consensus among the Justices. "In the end, the fact is inescapable that no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause even in the absence of a valid remedial purpose. . . . Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case." But the court treated the constitutional status of diversity as an "open question" and instead faulted the University's program for failing to meet the narrow-tailoring test. The narrow tailoring requirement is meant to insure that the chosen means "fit" a compelling goal so closely as to eliminate any possibility that the motive for a governmental classification is racial prejudice or stereotype. To achieve diversity, of compelling constitutional dimension, required the university to seek to achieve broad-based diversity, not just racial diversity. Such diversity, for the court, entailed consideration of the full range of student possibilities, in terms "of different cultures, outlooks, and experiences," and "does not view racial diversity as an end in itself."

Measured against this definition, UGA's policy failed because it "mechanically and inexorably" awarded "bonus" points to minority applicants and arbitrarily limited the number of nonracial factors that could be considered at the TSI stage,

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[37] 263 F.3d 1234 (11th Cir. 2001).

all at the expense of white applicants. Thus, for example, the court found that opportunities were diminished for applicants from rural or economically disadvantaged backgrounds, foreign language speakers, and – in appropriate circumstances – even white males "whose personal backgrounds or skills, while undeniably promoting diversity, do not fit neatly into one of the categories predetermined by UGA." Also significant was the university's failure to "meaningfully consider" race-conscious alternatives – recruitment and outreach strategies, financial incentives for disadvantaged students, guaranteed admission to the state's top high school graduates – that might foster diversity without adverse racial consequences. Ultimately, the failure to "fully and fairly [consider] applicants as individuals and not merely as members of groups" led to the policy's undoing, a defect that could not be justified by administrative convenience or the difficulty in making individualized determinations of each applicant's potential contribution to diversity. Summing up, the appeals court concluded:

> Unlike the Harvard plan described by Justice Powell, UGA's policy does not allow admissions officers to consider "all pertinent elements of diversity" or to decide – in awarding the 0.5 racial bonus – that the "potential contribution to diversity . . .of an applicant identified as Italian-American" is greater than that of a non-white applicant. The 0.5 point bonus is awarded mechanically, based entirely on the applicant's race. And while it is true that a small number of other TSI factors may, to a limited extent, capture qualities beyond race and contribute to student body diversity, they certainly do not come close to capturing the same degree the qualities or life experiences that would be taken into account if each applicant – including her potential contribution to diversity – were assessed fully and fairly as an individual.

Creating a Circuit conflict with the Fifth and Eleventh, the Ninth Circuit in *Smith v. University of Washington Law School*[38] upheld an affirmative action admission program to higher education that made extensive use of race-based factors. Overt use of race in law school admissions continued from 1994 to 1998, ending only after Washington voters adopted Initiative Measure 2000, a referendum banning all forms of racial, gender, and ethnic discrimination or preference in state programs. The *Smith* court disagreed with *Hopwood*'s holding that Justice Powell's diversity rationale was not binding Supreme Court precedent. Although no other *Bakke* Justices joined, or even discussed, diversity as a compelling state interest, the Ninth Circuit concluded that the four Brennan Justices who approved the racial quota in Davis medical school admissions "would have embraced [the diversity rationale] if need be." It followed, therefore, that Justice Powell's opinion provided "the narrowest footing upon which a race-conscious decision making process could stand" and is, accordingly, the "holding" of *Bakke* under controlling Supreme Court authority.[39] Even though the doctrinal underpinnings of *Bakke* were shaken by *Adarand* and the congressional redistricting cases, the Supreme Court has not revisited affirmative action in higher education, and the Ninth Circuit was reluctant to overturn the earlier precedent. The decision was of quite limited significance,

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[38]233 F.3d 1188 (9th Cir. 2000).

[39]See Marks v. United States, 430 U.S. 188, 193 (1977)("When a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

however, and was largely mooted by passage of the state's legislative ban on affirmative action in education programs.

The judicial divide over *Bakke*'s legacy was perhaps most vividly displayed by separate rulings of two federal district courts in *Gratz v. Bollinger*,[40] which upheld for diversity reasons the race-based undergraduate admissions policy of University of Michigan, and *Greutter v. Bollinger*,[41] where a different federal judge nullified a special admissions program for minority law students at the same institution. The latest word on the topic was delivered on May 14, 2002, when the Sixth Circuit *en banc* court reversed *Greutter*, finding that the Law School's interest in achieving the educational benefits of a diverse student body is compelling, and that its admissions policy is "narrowly tailored " to that goal.

Challenged in *Greutter* were the admission criteria for the University of Michigan Law School. While the documents put into evidence were circumspect in their description of the admission process, one conceded goal was to achieve the entry of some numbers of minority students – African-American, Native-Americans, Hispanics, and mainland Puerto Ricans – into the law school. Generally setting the bar for admission was a "grid" system of "index scores" derived from applicants' composite performance on the Law School Admissions Test (LSAT) and undergraduate grade point average (UGPA). A 1992 policy statement, however, departed from strict adherence to index scores to achieve "distinctive perspectives and experiences" and made an explicit commitment to "racial and ethnic diversity." From a welter of documentary and testimonial evidence, the trial judge concluded that there was indeed a "heavy emphasis" on race in admissions decisions; that the objective was to achieve a "critical mass" of minorities ranging from 11% to 17%; and that large numbers of minority students were admitted with index scores the same as or lower than unsuccessful white applicants. Rejecting the diversity rationale from *Bakke*, the federal district judge invalidated the special admissions program both for lack of a compelling state interest and failure to satisfy the constitutional requisites of narrow tailoring.

The Sixth Circuit *en banc* appeals court reversed Judge Friedman's decision by a five-to four vote. In his opinion for the majority, Judge Martin adopted the Powell position in *Bakke* to find that the Law school had a compelling interest in achieving the education benefits that flow from a diverse student body, and that its admission's policy was "narrowly tailored" to that end. By considering a range of "soft variables" – including an applicant's unique talents, interests, experiences, leadership qualities, and "underrepresented minority" status, among others – the admissions process was found to treat each applicant as an individual and to be "virtually indistinguishable" from the Harvard admissions plan approved by Justice Powell in *Bakke* . In its pursuit of a "critical mass," the policy was designed to ensure that a "meaningful number" of minority students were able "to contribute to classroom dialogue without feeling isolated" and "did not set aside or reserve" seats on the basis of race. The court further emphasized that the admissions program was "flexible," with no "fixed goal or target," did not use "separate tracks" for minority and nonminority candidates, and

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[40]122 F. Supp. 2d 811(E.D.Mich. 2000).

[41]Supra n. 7.

did not function as a "quota system." In answer to the dissenters, who argued for a lottery system or model of "experiential diversity in a race-neutral manner," Judge Martin was persuaded by the Law School's expert that some consideration of race and ethnicity was "necessary" to achieve a diverse student body since otherwise "minority enrollment would drop to 'token' levels." Finally, the majority was willing to extend "some degree of deference" to the "good faith" judgment of the Law School in regard to the groups targeted and duration of any program devoted to academic diversity.

The four dissenting judges, led by Judge Boggs, did not consider themselves bound by Justice Powell's solitary opinion in *Bakke* and concluded that diversity was not a compelling state interest. Disputing Judge Martin's argument that the Powell position was the narrowest ground of decision in *Bakke*, the dissent viewed the varying rationales of the concurring Justices to be so "fundamentally different by degree as to defy comparison." That is, "[t]hey are completely different rationales, neither one of which is subsumed within the other." The Supreme Court's affirmative action jurisprudence since *Bakke*, though not specifically concerned with race as a factor in educational admissions, clearly demonstrated that "racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination."

Even if diversity were a compelling interest, Judge Boggs concluded, the law school's admissions program would have failed to pass constitutional muster for lack of narrow tailoring. First, the standard implicit in a "critical mass" of minority students was too "ill defined" and "amorphous" to allow for predictable or quantifiable bounds. Secondly, there were no time limits provided for the use of race in the admissions process. Third, the "magnitude" of the racial preference – as demonstrated statistically – coupled with the consistent rate of minority admissions over several years amounted to a "two-track system that is functionally equivalent to a quota" and that "applies one standard for minorities and another for all other students." Fourth, the lack of a "principled explanation" for singling out the particular groups receiving special treatment undermined finding that the program was narrowly tailored. Finally, there was no evidence that the law school had investigated alternative race-neutral means for increasing minority enrollment – such as use of a lottery or seeking experiential diversity based on individualized scrutiny of every applicant – before implementing the special minority admissions policy.

Joining *Grutter* for Supreme Court review is the district court's determination in *Gratz* that student diversity is a compelling governmental interest for using race as a "plus" factor in higher educational admissions. Judge Duggan approved the University of Michigan's current undergraduate admissions system, which awards a 20-point advantage to black and Hispanic applicants on a 150-point scale, as well as six points for geographical factors, five points for leadership skills, three points for an outstanding essay, and so on. But the University's former policy, in place until 1998, violated equal protection of the laws because it established entirely separate admission criteria and procedures for white and minority applicants.

On the diversity issue, the *Gratz* court disputed *Hopwood's* conclusion that reticence by a majority of the *Bakke* Justices to embrace the Powell rationale necessarily implied a rejection of that theory. "It is just as likely that the other

Justices felt no need to address the issue of diversity based upon their determination that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination." Moreover, the defendants' briefs presented "solid evidence" of the educational benefits of racial and ethnic diversity on student intellectual development, which – though perhaps "too amorphous and ill-defined in other contexts"– satisfied the district court that there was a "permanent and ongoing interest" to justify affirmative action in higher education.

> As previously noted, diversity is not a 'remedy.' Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that Universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when Universities are able to achieve the desired diversity without resort to racial preferences. Such an occurrence, however, would have no affect (sic) on the compelling nature of the diversity interest. Rather, such an occurrence would affect the issue of whether a university's race-conscious admission program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such an interest.

Acknowledging the often "thin line" separating the permissible and impermissible use of race in such cases, the district court cited several considerations to uphold the current admission program as "narrowly tailored." First, the award of twenty points for minority status was not a "quota" or "dual track" system, as in *Bakke*, but only a "plus" factor, to be weighed against others in the selection process.

> What Plaintiffs really appear to contest is the fact that race is accorded twenty points while other factors that may more consistently favor non-minority students are not typically accorded the same weight. However, as Justice Powell recognized in *Bakke*, universities may accord an applicant's race some weight in the admissions process and, in doing so, universities are not required to accord the same weight to race as they do to other factors. (citations omitted) As long as the admissions process does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a `plus' on account of their race.

Similarly, the practice of "flagging" applications of "under-represented" minorities did not cross the line because it was invoked only to insure that otherwise qualified applicants were included in the "review pool" and likewise applied to other candidates possessing desired non-racial qualities. In addition, race-neutral alternatives to the current policy, including "vigorous minority recruitment," had failed to yield a "sufficiently diverse student body," said the court, therefore necessitating the "consideration of an applicant's race during the admissions process."

Prior to 1998, however, the university maintained a "rolling" admission program, which the court found involved the impermissible use of race because, in effect, it "reserved" seats for under-represented minorities, among other groups, who were "protected" from competition with other applicants. This earlier regime was

reinforced by "grids or action codes" that applied different academic standards based solely on race and permitted, for example, the automatic exclusion of nonminority– but not minority – applicants without any "individualized" review.[42]

> Although the . . .use of facially different grids/action codes based on an applicant's race, in and of itself, may not have been constitutionally impermissible, combined with other components previously discussed by the Court, i.e. . . .use of protected seats and the . . .system of automatic rejection, the Court is convinced that [the] prior programs, when examined in their entirety, fall within the impermissible under the principles enunciated by Justice Powell in *Bakke*.

Included in the Michigan cases were allegations of individual liability on the part of current and former officials of the University for maintaining affirmative action policies that they knew, or should have known, were unconstitutional. On appeal, the educators contended that their admissions policies differed substantially from an explicit dual track plan and conform to the dictates of *Bakke*, which forbids quotas but may allow nonexclusive consideration of race in the admissions process.

Supreme Court Review of the University of Michigan cases. Without waiting for a final appeals court decision, the Supreme Court agreed to review the *Gratz* undergraduate admissions case in tandem with the Sixth Circuit ruling in *Grutter* on December 2, 2002. Arguments before the Supreme Court in the Michigan cases are scheduled for April 1, 2003, with a ruling expected by late June. The constitutional standing of Justice Powell's diversity rationale, and the judicial controversy it has spawned, raise several important issues that the Supreme Court may have to revisit. Following a reportedly intense debate within the Bush Administration, the Department of Justice filed briefs amicus curiae on January 16, 2003 opposing the affirmative action admissions policies of the University of Michigan and advocating race neutral alternative plans for achieving a diverse student body.[43]

Post-*Bakke* appeals courts, guided by *Marks v. United States*,[44] have sliced and diced the various opinions in *Bakke* to come up with a controlling rationale. In *Marks*, the Supreme Court ruled that when a majority of Justices are unable to agree on a controlling rationale, the holding of the Court is the position of those Justices concurring in the judgment on the narrowest grounds. The pro-diversity circuits have concluded that the Powell opinion approving race as a "plus" factor is narrower than the Brennan rationale, which would have upheld the race quota in *Bakke* on a

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[42]For example, in 1995 and 1996, the University used two grids for in state applicants, one for "non-minority" applicants and another for "minority" applicants. The non-minority grid indicated that an applicant with a GPA of 3.2 and ACT test score of 18-20/ SAT of 400-500 would be automatically rejected, whereas a minority applicant with the same grade/score would most likely have been admitted.

[43]Brief for the United States As Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, No. 02-241 (filed 1-17-2003); Id. Gratz v. Bollinger, No. 02-516 (filed 1-17-2003).

[44]430 U.S. 188 (1977).

societal discrimination theory. The opposing circuits have generally reasoned otherwise or concluded that the competing *Bakke* opinions defy rational comparison so that absent a majority consensus, the Powell opinion is without controlling weight. The Supreme Court is no way bound by *Bakke*, and its review of the Michigan cases will probably occasion fundamental reexamination of issues raised by that earlier precedent.

Ultimately, the question may turn on how strictly "strict scrutiny" is applied by the Supreme Court to collegiate affirmative action policies. Under a highly formalized competitive bidding process, the Court in *Croson* and *Adarand* ruled that any consideration of race in the distribution of government contracts must serve a compelling state interest and be narrowly tailored. An arguably softer form of strict scrutiny was developed in *Shaw v. Reno*[45] and later cases involving congressional redistricting along racial lines. The ideal of colorblindness does not require that redistricting legislatures ignore race. Instead, the Court has recognized that along with politics, incumbent protection, and a host of other factors, race may play a role in the creation and configuration of districts. But strict scrutiny is triggered if race trumps or subordinates all of these other traditional principles in the redistricting process. Moreover, the state interest in avoiding dilution of minority voting power and discriminatory effects prohibited by the Voting Rights Act are compelling under *Shaw* and its progeny.[46] This may more closely correspond to the Powell rationale that race together with a host of other social, demographic, and personal factors spell diversity deserving of constitutional protection.

On the other hand, under the narrow tailoring aspect of strict scrutiny, the weight given race in the admissions calculus and its impact on affected nonminority candidates may prove crucial. In *Grutter*, this boiled down to a battle of statistics. For example, the majority pointed to long range variability, year to year, in the percentage of minority admissions and its marginal impact on the probability of admission by nonminorities to the highly selective law school. This it called the "causation fallacy." In a selective admissions process, the competition is so intense that even without affirmative action, the overwhelming majority of rejected white applicants still would not be admitted. Conversely, Judge Boggs pointed to other statistics indicating the decisive weight of race in the admissions process. Marginally qualified minority candidates were almost invariably admitted while nonminorities of like qualifications were rejected. In other words, according to the dissenter's argument, race was the "predominant," rather than a "plus" factor. As discussed below, the Justice Department briefs support the dissent's point of view on this issue.

A diversity rationale also poses a dilemma underscored by Justice O'Connor in other affirmative action contexts. In *Croson*, for example, specific findings of discrimination were necessary because the concept of societal discrimination was too amorphous and timeless to deal with. Query whether a university administrator's notion of a "critical mass" of minority students for the sake of educational diversity is any less so. The quest for diversity in admissions is not self-limiting. Arguably, it poses a constantly changing commitment as different racial and ethnic groups vie

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[45]509 U.S. 630 (1993).

[46]Bush v. Vera, 517 U.S. 952 (1996).

for consideration into the future. A permanent regime of race or ethnic preference "without a logical stopping point" may be the result: a tough sell to a majority of the current Justices. Conversely, explicit numerical standards, as used in *Gratz*, may collide with the constitutional demand for flexibility to avoid the "quota" tag.

As a race neutral alternative, both the Eleventh Circuit in the Georgia case, and the *Grutter* dissent, urge an "experiential diversity" model. In effect, this boils down to examining each applicant individually for those factors other than race or ethnicity – talents, family background, struggles against disadvantage, leadership qualities, and the like– that would contribute to academic diversity on a broad scale. While this would level the playing field, its ability to expand opportunities for racial minorities is questioned by most educators. In addition, such a system may impose a substantial administrative burden in terms of resources devoted to the admissions process by large state institutions with many thousands of applicants.

The Justice Department entered the debate when it filed the government's briefs in support of the white students rejected for admission in *Grutter* and *Gratz.* It did not attack *Bakke*, in so many words, nor did it question the educational benefits of diversity in the academic setting. Instead, the thrust of the government's argument is that Michigan undergraduate and law school admissions policies failed the constitutional narrow tailoring requirement because they ignored race neutral alternatives. Specifically, the briefs contend, "percentage plans" in Texas, Florida, and California that guarantee admission to top high school graduates in those states, regardless of race, have succeeded in achieving the "paramount interest" of the state to insure "open" and "equal access" to all students. Alternatively, "experiential diversity," like that urged by Judge Boggs' dissent in *Grutter*, was advocated as a way to achieve "genuine" diversity of "experiences and viewpoints." Consideration of "numerous race neutral factors" – e.g. work and family history, talents, leadership potential, socioeconomic status, etc – for each candidate, the government argues, would avoid constitutional objection and provide better proxies for student diversity than race.

In contrast, Michigan's 1999 undergraduate admissions policy was condemned by the government in *Gratz* for providing an "enormous inflexible bonus" to preferred minority applicants "without regard to their background, academic performance, or life experiences. . ." By "flagging" minority applications for individualized review "solely" because of race, while automatically rejecting other equally qualified candidates, the current plan created a "dual admissions system." The change from an "open quota system" of grids in 1995-1998 to a "race-based bonus" a year later, the brief argues, was one of "mechanics, and not the substance" in the selection process. "After all, adding 20 points has no independent significance apart from its effect on the number of preferred minority students admitted. Selecting the 'correct' race-based bonus generates the 'correct' number of minority students." And simply "disguis[ing] its racial quota" does not change the "overwhelming" importance of race in the process of "admitting virtually every qualified under-represented minority applicant, while denying admission to non-

preferred applicants with the same or better qualifications based solely on their race."[47]

Similarly, in *Grutter*, the quest for a "critical mass" of minority students in law school admissions is opposed by the government as the "functional equivalent" of a quota system and because the university ignores race neutral alternatives. In particular, the Justice brief points to a "remarkable degree of consistency" in minority enrollment from 1995 to 1998 – between 44 and 47 students per year – coupled with certain administrative aspects of the admissions process.

> Respondents' race-based pursuit of a predetermined 'critical mass' is not meaningfully different from the strict numerical quotas this Court invalidated in *Bakke*. Variations in the ultimate number of enrolled minorities has more to do with respondents' inability to predict rates of acceptance with absolute precision than it does to any true flexibility that would meaningfully distance the program from more traditional quotas. The Dean and the Director of Admissions consult 'daily admissions reports' that reflect 'how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit.' . . . The fact that the Law School enrolls minorities in percentages 'roughly equal' to their percentages in the applicant pool 'supports the inference that [it] seeks to allocate [places in an entering class] based on race. . . . After all, if the 'critical mass' were truly an undefined number or percentage, as the Law School claims, actual enrollment figures for preferred minority applicants would not consistently reflect their percentages in the total applicant pool.[48]

According to the Justice briefs, other factors further contradict claims by the university to a "narrowly tailored" admissions policy. Thus, the government argues, Michigan permits racial preferences "in perpetuity;" its current policies are "inflexible" in "mechanically" awarding an "enormous" and "disproportionate" weight to race over "other factors related to educational diversity;" and they "unfairly burden innocent third parties" by "accepting favored minority candidates who have lesser objective qualifications."[49]

While the briefs were circumspect on the question of racial diversity and *Bakke* as precedent, a few clues as to the government's position were evident. Noting the current state of judicial disarray, in a passing footnote, the *Grutter* brief dismisses the quest for *Bakke*'s meaning as "not useful," instead urging the court to "resolve the constitutionality of race-admissions standards by focusing on the availability of race-neutral alternatives."[50] Also, in describing the "important and entirely legitimate government objective" of insuring that public educational institutions are "open and accessible" to all persons, the Justice briefs may depart from *Bakke*'s constitutional notion of educational diversity as a "compelling" state interest. Finally, in *Grutter*, the government voices skepticism for the empirical basis of Michigan's admissions

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[47]Gratz brief, pp. 21- 26.

[48]Grutter brief at pp 28-29, 30.

[49]Gratz brief, pp.27 -31; Grutter brief, pp. 33-37.

[50]Grutter brief, pp15-16, n.4.

policies, arguing that "[t]he Law School's rationale for seeking diversity has not always been consistent." And, further, "[i]f all a university 'need do is find. . . report[s],' studies, or recommendations 'to enact' a race-based admissions policy, 'the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.'"[51]

The Court Hears Oral Arguments. Oral arguments before the Supreme Court on April 1, 2003 offered no real surprises. Justice O'Connor was the key vote going in, and she seemed to remain so coming out. Three Justices – Rehnquist, Scalia, and Kennedy – seemed distinctly unsympathetic to the university's case. Each branded the undergraduate and/or law school admissions policy with the dreaded "q" word – i.e. "quota" or "disguised quota" – at some point during the two hour argument. Sparse questioning by Justice Thomas was less revealing. But judging from his prior edicts on the same subject, he is probably a reliable fourth vote for any Rehnquist-led plurality. On the other side, Justices Souter and Ginsburg tried to head off an attack by the Solicitor General (SG), who joined the petitioners' campaign against the university admissions policies. Several former and retired military officers filed an *amicus curiae* brief in support of current race-conscious admissions policies of the U.S. armed services academies. Asked to reconcile this brief with the Justice Department's own position, the SG observed only that the issues were different, given the constitutional deference generally accorded the military in governing its own affairs. Justice Breyer's questioning also seemed to signal acceptance of diversity in higher education as a compelling state interest. Some greater skepticism of the Michigan policy was voiced by Justice Stevens, who also voted to outlaw racial considerations in the *Bakke* case, but his position may turn on whether he agrees with the Chief Justice *et al*. on the quota equivalence argument. Justice O'Connor appeared more sympathetic to the university's position that racial diversity has a valuable role to play in the educational process, and the world of work in a global economy. She expressed impatience with the petitioners' "absolutist" position, noting past cases where the Court has approved of voluntary affirmative action in employment and elsewhere. But the lack of a "sunset" or time limit on the consideration of race for diversity purposes did prompt misgivings on her part. Justice O'Connor, therefore, may more likely approach the Michigan policies from the narrow tailoring angle – for example, by requiring further consideration of race neutral alternatives – and preserve some "wiggle room" for use of "race conscious" diversity programs – at least temporarily – where all else fails.

Conceivably, however, the Court could avoid the constitutional issue and decide the case under Title VI of the 1964 Civil Rights Act. This was the position taken by four concurring Justices in *Bakke*, and Title VI has since been interpreted by Department of Education regulations to require or permit affirmative action by federally funded institutions of higher learning, whether public or private. In effect, this would punt the question back to Congress and defer the difficult constitutional determination. One obstacle, however, is that petitioners have not asked for a Title VI ruling, and the question was not briefed by the parties.

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[51]Id., p. 32, n. 8.

Racial Student Assignments to Public Elementary and Secondary Schools. The constitutionality of race-conscious admissions to magnet or alternative schools, designed to promote elementary and secondary school desegregation, has also been before the courts. A federal court in 1974 found the Boston schools to be unlawfully segregated and ordered into effect a desegregation plan requiring, *inter alia,* a thirty-five percent set-aside for admission of black and Hispanic students to the city's three "examination" schools.[52] This policy was revised to eliminate the set-aside after a successful equal protection challenge was brought in 1996 by a white student who was denied admission to the famed Boston Latin School.[53] Under the new policy, half of the available seats at each school was awarded solely on the basis of students' composite scores, derived from grade point averages and entrance examination scores. The other half was also awarded according to composite score rankings, but in conjunction with "flexible racial/ethnic guidelines." The guidelines required that these seats be allocated by composite rank score in proportion to the racial and ethnic composition of each school's remaining qualified applicant pool. A white student denied admission for the 1997-98 academic year, despite higher qualifications than several admitted minority students, challenged the guidelines on equal protection grounds.

In *Wessman v. Gittens,*[54] the First Circuit reversed a judgment in favor of the Boston School Committee, which had adopted the two-track admissions policy. The district court had applied strict scrutiny, but nonetheless concluded that the policy was constitutional based on the school system's compelling interests in diversity and in "overcoming the vestiges of past discrimination and avoiding the re-segregation of the Boston Public Schools." According to the appeals court, however, the School Committee had not produced sufficient evidence to demonstrate a compelling interest in either goal or that the admissions policy was narrowly tailored to those ends. First, there was no "solid and compelling evidence" that student diversity was "in any way tied to the vigorous exchange of ideas," nor that any achievement gap between minority and non-minority students amounted to "vestiges" of the system's past discrimination. The policy also swept "too broadly" by dividing individuals into "only five groups — blacks, whites, Hispanic, Asians, and Native Americans — without recognizing that none is monolithic." Thus, even assuming *arguendo* that diversity might, in some circumstances, be sufficiently compelling to justify race-conscious actions, "the School Committee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means of racial balancing," which is neither "a legitimate [n]or necessary means of advancing the lofty principles credited in the policy."[55]

In a pair of recent decisions, the Fourth Circuit invalidated affirmative action policies for admission of minority students to magnet schools in Arlington County, Va. and Montgomery County, Md. Because neither policy was found to satisfy the

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[52]See Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (lst Cir. 1974).

[53]See McLaughlin v. Boston School Committee, 938 F. Supp. 1001 (D.Mass. 1996).

[54]160 F.3d 790 (lst Cir. 1998).

[55]160 F.3d at 799.

"narrow tailoring" aspect of strict scrutiny as required by *Adarand*, however, it was unnecessary for the court to decide whether educational diversity may be a "compelling interest" justifying race based admissions in other circumstances. At issue in the Arlington County case, *Tuttle v. Arlington County School Board*,[56] was a "sequential, weighted random lottery" system developed in response to prior litigation which took account of three factors – low-income background, the applicant's primary language, and race or ethnicity – in determining admission to three county magnet schools. The probabilities associated with each applicant's lottery number were weighted, so that members of under-represented groups, as defined by any of those factors, had an increased probability of selection. In the Montgomery County case, *Eisenberg v. Montgomery County Public Schools*,[57] school officials considered a variety of factors, including a "diversity profile" of affected schools, when deciding whether to grant applications for transfer from a student's assigned school to another county public school. The diversity profile, in effect, precluded transfer of students of a particular racial or ethnic background – White, Black, Asian or Hispanic – from any school where the percentage of that group in the student body had declined over the preceding three years and was under-represented when compared to the county as a whole. In both cases, the challenged policy led to white students being denied admission to schools of their choice for racial reasons tied to student diversity.

While the Arlington County school system, earlier in its history, had been found to be *de jure* segregated and was required to desegregate by judicial decree, Montgomery County had never been subject to court supervised desegregation. Rather, the Maryland district had dismantled its formerly segregated schools by voluntary means, one aspect of which included implementation of a magnet school program. In neither case, however, did the Fourth Circuit attribute a remedial purpose to the diversity interest asserted by the school board, but found that the admissions and transfer policies in question were an exercise in "racial balancing." In so doing, the appeals court sidestepped deciding whether racial diversity in education could ever be a "compelling" state interest, proceeding instead to find the challenged policies failed the narrow tailoring aspect of *Adarand* analysis. In the Arlington case, the school board was found to have disregarded "one or more race-neutral policies" recommended by an advisory committee as alternatives to promote diversity. The duration of the plan was criticized for being "in perpetuity" and without "a logical stopping point." Although the weighted lottery did not "set-aside" positions for minorities, according to the court, the practical effect was the same since it "skew[ed] the odds of selection" in their favor to achieve classroom diversity "in proportions that approximate the distribution of students from [racial] groups in the district's overall student population." Finally, the plan lacked flexibility and impermissibly burdened "innocent third parties" who are denied admission for racial or ethnic reasons. Montgomery County's race-conscious transfer policy was characterized by the court as "mere racial balancing in a pure form" due to many of the same failings and because it was not directed at the correction of any past constitutional wrongs.

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[56]189 F.3d 431 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

[57]197 F.3d 123 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

> The County annually ascertains the percentage of enrolled public school students by race on a county-wide basis, and then does the same for each school. It then assigns a numbered category for each race at each school, and administers the transfer policy so that the race and percentage in each school to which students are assigned by residence is compared to the percentage of that race in the countywide system. The transfer policy is administered with an object toward maintaining this percentage of racial balance in each school. . . . Although the transfer policy does not necessarily apply 'hard and fast quotas,' its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.[58]

Montgomery County officials were directed to eliminate the consideration of race from student transfer decisions, while in the Arlington case, further proceedings in the district court were ordered to review alternative admissions policies.

On April 15, 2002, the U.S. Supreme Court denied review of the Fourth Circuit *en banc* decision in *Belk v. Charlotte Mecklenburg Board of Education*.[59] The appeals court there affirmed a finding that "all vestiges of past discrimination" had been erased from the school system where student busing was first approved by the Supreme Court as a desegregation remedy. Because of its newly achieved "unitary status," the district court had relinquished jurisdiction of the desegregation case and ordered the school district to stop "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides or other means that deny students an equal footing based on race." The specific target of Judge Potter's order was the race-conscious policy for admission of students to the magnet school program operated by the district for desegregation purposes. After nearly three decades of court-enforced desegregation, a white parent sued the school district, charging that his daughter had twice been denied admittance to a magnet school because she was not black. Six other white parents joined the case, arguing that the school district had been successfully rid of segregation and with it any constitutional justification for race-based preferences.

Judge Potter agreed, calling the argument for continuing the desegregation process a "bizarre posture" and the focus on racial diversity a "social experiment." The policy of allocating available magnet school spaces to reflect the racial student makeup of the district as a whole was condemned by the court as "nothing more than a means for racial balancing," which could not be justified by a "litany of generalizations lauding the benefits of racial diversity." A majority of the *en banc* appellate court affirmed that the school district had eliminated the "last vestiges" of unconstitutional segregation to the fullest extent "practicable." Any remaining racial concentrations, therefore, were a consequence of factors – namely residential segregation – beyond the power of school authorities or the courts to control. In a unitary setting, the magnet admissions process could not clear the first hurdle by showing a compelling governmental interest, and the school district could not make "any further use of race-based lotteries, preferences, and set-asides in student assignment." A slightly different majority ruled that the school board could not be

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[58]Id. at 133.

[59]269 F.3d 305 (4th Cir. 2001), cert. denied, 70 USLW 3482 (S.Ct. 4-15-2002).

held liable for its use of race in assigning students to magnet schools since the program had originated in a then valid desegregate order. But if the same plan were adopted after the district is declared unitary, it would clearly be unconstitutional under *Tuttle* and *Eisenberg (supra),* these judges opined.

One federal appellate court, the Ninth Circuit, appears ready to part company with other courts on the diversity issue. The University of California operates a popular elementary school as a "laboratory" to research urban education and "to foster a more effective educational system primarily for urban elementary students." Beyond basic research, the school develops new techniques for educating students in multi-cultural urban settings and conducts seminars, workshops, and teacher training programs throughout the state. The school considers applicants' race and ethnicity to obtain adequate cross-samples of the general population and thus to maintain "the scientific credibility of its educational studies." The plaintiff in *Hunter v. Regents of the University of California*[60] challenged the school's admissions policy as an equal protection violation. While perhaps not tantamount to a diversity rationale, the Ninth Circuit nonetheless agreed with the district court judge that the state's interest in "operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools" was compelling even absent any purpose of remedying past discrimination.

> The challenges posed by California's increasingly diverse population intensify the state's interest in improving urban public schools. Cultural and economic differences in the classroom pose special difficulties for public school teachers. In his decision, Judge Kenyon noted that defendants presented 'an exhaustive list of such issues and challenges [that] includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children.' [An expert witness] stated that '[t]here is no more pressing problem, facing California, or indeed the nation, than urban education; for it is in the urban school system that the majority of California's future citizens will be educated (either well or poorly), creating the basic fabric for the society of the future.' . . . Given this record, the district court concluded, and we agree, that 'the defendants' interest in operating a research-oriented elementary school is compelling.'[61]

Given the demographics of California's urban population, and the necessity of creating a multi-cultural laboratory setting, the consideration of race for admission to the school was deemed "narrowly tailored" since "it would not be possible, nor would it be reasonable, to require defendants to attempt to obtain an ethnically diverse representative sample of students without specific racial target and classifications."[62]

Faculty Diversity. Corollary issues concerning faculty diversity have also been before the courts recently, including the *Piscataway* case, which was dismissed

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[60]1999 WL 694865 (9th Cir. 9-9-99).

[61]Id. at pp 2-3.

[62]Id. at 4.

as moot by the Supreme Court after the parties reached an out-of-court settlement. The appeal from *Taxman v. Board of Education of Piscataway Township*[63] had asked the High Court to consider whether a local school board's desire to promote faculty diversity could legally justify its decision to protect a black teacher from layoff, while dismissing an equally qualified white colleague, in the absence of a showing of past discrimination or a "manifest" racial imbalance in its workforce. Two teachers, one white, the other black, were hired on the same day in 1980 and were deemed equally qualified for their positions in the business education department when a reduction in force became necessary eight years later. Minority teachers were not underrepresented on the overall faculty--constituting 9.5 % of the district's teachers versus 5.8 % of the relevant county labor pool--and no evidence of past discrimination by the school district was presented at trial. A "coin toss" had traditionally been used to determine retention rights among similarly situated employees in the past. But because only one black teacher was among the business department's ten-member staff, the school district relied on its affirmative action policy to retain the minority employee rather than her white colleague in the interests of promoting racial diversity.

An *en banc* majority of the Third Circuit determined that however laudable the school board's objective might be, laying off a white reacher "solely" on the basis of race to achieve faculty diversity exceeded the bounds of controlling Supreme Court precedent. Title VII rulings in *Weber* and *Johnson (supra)* permitted employers to make employment decisions based on race or gender in order to redress a "manifest" imbalance of minorities and women in "traditionally segregated job categories." But judicial teachings generally caution against affirmative action measures that "unnecessarily trammel" or frustrate the "legitimate and firmly rooted expectation in continued employment" of affected non-minorities. In its 1986 *Wygant* decision, the Court voided race-based layoff protection for minority public school teachers because of its immediate adverse impact on "identifiable" senior white employees. Consequently, while applauding the board's commitment to racial diversity, the *Taxman* appellate opinion rejected the non-remedial educational purposes asserted by the board for its affirmative action plan because "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." And because the entire burden of the board's plan fell upon the white teacher whose interests were "unnecessarily trammeled" by the loss of her job, the race-based policy violated Title VII.

On March 9, 1998, the Supreme Court declined to review the legality of a "minority bonus policy" in an affirmative action plan established for Nevada's public colleges to redress a lack of minority faculty members. In *Farmer v. University and Community College Systems of Nevada*,[64] the plaintiff had been one of three finalists for a faculty position in the sociology department which the university awarded to a black male candidate from Uganda with "comparable" qualifications. The university's minority bonus policy, which the Nevada Supreme Court described as an "unwritten amendment" to its affirmative action plan, allowed a department to hire

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[63]91 F.3d 1547 (3d Cir. 1996), appeal dismissed sub nom. U.S. v. Board of Education of the Township of Piscataway, 118 S. Ct. 595 (1998).

[64]930 P.2d 730 (Nev. 1997), cert. denied No. 97-1104, 118 S. Ct 1186 (1998).

an additional faculty member following the initial placement of a minority candidate. As a consequence, plaintiff was hired by the sociology department a year later, but at a lesser salary than the earlier-hired black candidate. The differential was defended by the university as reflecting a pay premium necessary "to prevent[ ] a bidding war between two prestigious universities slated to interview [the black candidate]." Farmer challenged both the hiring and pay decisions by the university as race and sex discrimination prohibited by Title VII and the Equal Pay Act.

The state supreme court reversed a jury verdict for the plaintiff and upheld the university's affirmative action hiring policy on both federal constitutional and statutory grounds. First, according to the court, race was only one factor considered by the university--along with educational background, publishing, teaching experience, etc.--in evaluating applicants. In contrast to *Piscataway*, the university faculty was a "white enclave" with only 1 % black members, a factor persuading the court that the university had a "compelling interest in fostering a culturally and ethnically diverse faculty" under standards laid out by the *Bakke* and *Weber* cases.

> Here, in addition to considerations of race, the University based its employment decision on such criteria as educational background, publishing, teaching experience, and areas of specialization. This satisfies *Bakke's* commands that race must be only one of several factors used in evaluating applicants. We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.

Thus, severe minority underrepresentation on the university faculty combined with the employer's consideration of relative qualifications in addition to race distinguished *Piscataway*, the Nevada court felt, and conformed the case to Justice Powell's *Bakke* opinion. In addition, the impact of the initial minority hire was mitigated by affording the disappointed white applicant a subsequent position created pursuant to informal practice or custom under the affirmative action policy.

Conclusion

Collectively, the trend of recent judicial decisions marginalizes the constitutional value of student or faculty diversity as support for racial or ethnic preferences which are not "narrowly tailored" to correcting the present-day effects of historical discrimination for which the institution itself is responsible. The Supreme Court's earlier refusal to review the *Hopwood* case had an unsettling impact on academic affirmative action policies nationwide. First, it imperiled use of the diversity rationale as justification for the use of racial classifications in the admissions process. Prior to *Hopwood* and its progeny, university officials could argue that their programs promoted the state's compelling interest in the robust exchange of ideas and viewpoints by ensuring a racially and ethnically diverse student body. As important, the Fifth Circuit's decision limited the scope of the remedial justification traditionally recognized by the courts to justify affirmative action as a constitutional antidote for past discrimination. In addition to rejecting societal discrimination, *Hopwood* excluded from evidence proof of discrimination originating from any official source — including the public education establishment

at all levels — unless attributable to conduct by the specific institution taking the challenged remedial action.

Seeing the writing on the wall, many higher educational institutions have resorted to what has been termed "alternative action," or policies designed to promote racial diversity without relying on racial preferences. Schools in California, for example, are experimenting with "class-based" affirmative action, taking socioeconomic status or family educational background of applicants into account. UCLA targets financial aid programs towards underprivileged neighborhoods as a means of reaching minority students. Texas law, in response to *Hopwood*, entitles the top ten percent of every graduating high school class in the state to public college or university admission. Other schools consider "diversity" or "hardship" essays in which applicants describe challenging life experiences such as poverty, English as a second language, or having a family member in prison. Some reformers advocate targeting additional resources to underperforming elementary and secondary schools as a way to address the root causes of minority under-representation in higher education. Florida has adopted a composite of many of these approaches. The "One Florida" plan guarantees every Florida student who graduates in the top 20% of his or her graduating class admission to one of that state's 10 public colleges. It has replaced race and ethnicity with other socio-economic and geographical proxies for diversity; increased the state's need-based financial aid program; seeks to improve the state's lowest performing primary and secondary schools; and provides free SAT prep courses at those schools.

Whether academic institutions may altogether avoid the constitutional shoals by adopting such "race-neutral" plans to increase minority admissions remains to be seen. On one hand, by eschewing the use of explicit racial classifications and dual track admission policies, these efforts may be far less susceptible to facial challenge as an equal protection violation. Programs involving the explicit consideration of race have thus far been the focus of judicial objection. But equally vulnerable may be policies that employ nonracial factors as a proxy for race if the purpose or intent is to benefit minority groups. In *Washington v. Davis*,[65] and related precedent,[66] the Supreme Court determined that a race neutral law with a disparate racial impact on minority groups is subject to strict scrutiny if it is enacted with a racially discriminatory purpose. Racial motive was made a constitutional "touchstone" for equal protection analysis, and whether reflected by a racial classification, or other

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[65]426 U.S. 229 (1976).

[66]Cf. Personnel Administrator v. Feeney, 442 U.S. 256 (1979). In Feeney, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279. Although Feeney involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is "discriminatory" with respect to a particular trait has been applied to claims of racial discrimination as well. See Hernandez v. New York, 500 U.S. 352, 360 (1991).

evidence of discriminatory purpose, strict scrutiny was triggered by evidence of such intent. Similarly, alternatives to traditional race-based affirmative action may not escape strict judicial scrutiny if an objecting non-minority applicant is able to demonstrate that the motivation for the plan was the policymaker's purpose or intent to aid racial or ethnic minorities. Corollary principles may spill over to private institutions, which are immune from constitutional limitations, under Title VI of the 1964 Civil Rights Act. In *Guardians Association v. New York Civil Service Commission*,[67] while disagreeing on the appropriate statutory standards, a majority of the Justices agreed that plaintiffs had a private right of action for intentional race discrimination under Title VI.

However the Supreme Court resolves the University of Michigan controversy later this term, the outcome in *Grutter* or *Gratz*, may not be limited to public colleges and universities. Private school affirmative action policies could be challenged under Title VI of the 1964 Civil Rights Act, which imposes a comparable ban on discrimination by private schools as the Equal Protection Clause does in the public sphere. Consequently, since virtually all higher educational institutions receive some federal funding, both public and private schools would likely be affected by whatever the Supreme Court eventually decides regarding affirmative action in education.

[67] 463 U.S. 582, 593 (1983).